SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 586

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

vs.

DOROTHEA T. FRANK.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

LOUIS J. VORHAUS,
Counsel for Appellee.

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STATEMENT AGAINST JURISDICTION AND MOTIONS TO DISMISS OR AFFIRM.

Dorothea T. Frank, Appellee in the above entitled case, files herewith a statement of matters and grounds making against the jurisdiction of this Court asserted by the appellant:

I. The Nature of the Case and the Ruling of the Court Below:

Appellant consolidated corporation was formed in April 1923, under the laws of five states, among them New York

(R. 25; 287). The validity of that consolidation was sustained by this Court.

Snyder v. *N. Y., C. & St. L. R. Co.*, 278 U. S. 578, 49 S. Ct. 176, affirming 118 Ohio St. 72.

§142 of the New York Railroad Law (Consolidated Laws of New York, Vol. 48, p. 157) provided:

> "Upon the consummation of such act of consolidation all the rights, privileges, exemptions and franchises of each of the corporations, parties to the same, and all the property, real, personal and mixed, and all the debts due on whatever account to either of them, as well as all stock subscriptions and other things in action belonging to either of them, shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed; and all claims, demands, property, rights of way, and every other interest shall be as effectually the property of the new corporation as they were of the former corporations, parties to such agreement and act * * *."

It is conceded that appellant did acquire the properties of its constituent companies (R. 26; 287-288).

§141, subdiv. 2, of the same law (Consolidated Laws of New York, Vol. 48, p. 156) provides:

> "* * * but such act of consolidation shall not release such new corporation from any of the restrictions, liabilities or duties of the several corporations so consolidated."

The Lake Erie & Western Railroad Company had guaranteed payment of interest coupons of the Northern Ohio bonds in October 1895 (R. 23-25; 286). This was before the enactment of §20a of the Interstate Commerce Act (U. S. C., Title 49; 41 Stat. 494; Act. Feb. 28, 1920, C. 91, §439).

When, by consolidation, The Lake Erie & Western Rail-

road Company became a constituent of appellant corporation, the latter, by virtue of the Railroad Law, §142, acquired all of the property of the former; this, as stated, is conceded.

New York Railroad Law, §143 (Consolidated Laws of New York, Vol. 48, p. 158) provides:

> "The rights of all creditors of, and all liens upon the property of, either of such corporations, parties to such agreement and act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of such corporations shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if incurred or contracted by it * * *."

Appellee accordingly brought suit against appellant, consolidated corporation, upon the guaranty of its constituent, to recover the amount of five overdue coupons.

The court below ruled (R. 301-304) that there is no conflict between said §143 and Interstate Commerce Act §20a; that appellant did not "assume" or guarantee any debt of The Lake Erie & Western; but that the debts "attached" and became its own by virtue of the statute.

II. There is No Conflict Between §143, New York Railroad Law, and §20a of the Interstate Commerce Act:

§20a, Interstate Commerce Act (U. S. C., Title 49; 41 State 494; Act. Feb. 28, 1929, C. 91, §439), provides:

> "* * * it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in re-

> spect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that * * * the Commission by order authorizes such issue or assumption. * * *"

The purpose of the State statute is to charge the consolidated corporation and its property with the subsisting debts and liabilities of its constituent corporations and to prevent their defeat by the transfer of their property through the consolidation. §20a of the Interstate Commerce Act is not aimed at such debts and liabilities; it relates to obligations and liabilities newly created or assumed; its field of operation is wholly distinct from that covered by the State statute.

> *Missouri-Kansas-Texas R. Co.* v. *Mars*, 278 U. S. 258, 49 S. Ct. 103.

In the case cited, a railroad company, against which defendants in error had obtained judgment for damages to cattle, was reorganized after sale by a receiver. The State statute provided that the property and franchise so purchased should be charged with and subject to the payment of all subsisting claims, among others, for loss of or damage to property sustained in the operation of the railroad by the sold out company. The action was brought to recover the amount unpaid upon the judgment and to foreclose a lien therefor which defendant in error claimed to have, under the statute, upon the railroad properties so acquired. This Court affirmed judgment for defendant in error, holding it required no discussion or citation of authority to show that there was no conflict between the State statute and the provisions of §20a of the Transportation Act relative to assumption of liability.

No new obligation was here "assumed" by appellant; the liability had been created by The Lake Erie & Western

R. R. Co.; and as an existing obligation of one of its constituents "attached" to the consolidated corporation. Appellant's liability is not predicated upon any "assumption" under §20a, but upon the fact that the rights of creditors of the constituent corporations were preserved by consolidation under §143. It was not a guarantee which appellant "assumed" but an old liability which "attached" to it.

Friedman v. *N. Y. C. & St. L. R. R. Co.*, New York Law Journal April 27, 1940, at p. 1740 (per Rosenman, J.).

The argument that if §20a is construed as it has been by the State courts, the Commission was at that time powerless to prevent interstate carriers from undertaking heavy security obligations as the result of consolidation, is without force. In the first place, the State statutes, relative to consolidation and its incidents had not been superseded by Congressional Act.

Snyder v. *N. Y. C. & St. L. R. R. Co.*, 278 U. S. 578, 49 S. Ct. 176.

Further, because the obligations attaching to the consolidated corporation were but the sum total of the existing obligations of its constituents.

Again, when application was made to the Commission by this appellant consolidated corporation for authority to operate the lines of its constituents and to issue its own capital stock in exchange for the capital stock of its constituents, pursuant to the Articles of Consolidation (R. 26; 287), the Commission was apprised and was fully aware of the provisions of the applicable State statutes by the terms of which the liability of its constituent corporation attached to the consolidated corporation. This is clearly shown by the opinion which the Commission rendered.

Operation of Lines and Issue of Capital Stock by the New York, Chicago & St. Louis Railroad Company, 79 I. C. C. 581, 585 (June 18, 1923).

It is fair to assume, therefore, that when the Commission granted to appellant the authority to operate the lines and issue its stock in exchange for the stock of its constituents, it necessarily approved the conditions under which the consolidation was effected, including the attaching to the new company of the liabilities of its constituents; for by the provisions of §20a (2) the Commission could make the order only if it found that such issue was "compatible with the public interest * * * necessary or appropriate for or consistent with the performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service".

That the Commission understood the effect of the authorization which it granted is also clear from its later opinion:

> "It appears that the consolidation was completed on April 11th, 1923, and that the new company is now vested with the property, rights and franchises of the Nickel Plate and other constituent companies, subject to all their debts, obligations and liabilities."
>
> *New York, Chicago & St. Louis R. R. Bonds*, 82 I. C. C. 365.

Obviously, appellant likewise fully understood that it was charged with liability, which attached by the consolidation, upon the debts of its constituents. For, significantly, while it did apply, as it was bound to do, for authority to issue its own shares in exchange for those of its constituents, because a new issue was involved (R. 26), it did not apply for authority to assume liability upon the guaranties (R. 49); clearly not to escape or evade such liability, but because the liability "attached" and authorization was unnecessary. Certainly, § 20a does not confer upon the consolidated corporation any discretion to reject or repudiate any debt or liability which had been incurred prior to the consolidation by any of the constituent corporations.

In *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331, 44 S. Ct. 376, the opinion made reference to future issues and did not relate to liabilities which attached through consolidation.

Subsequent to the decision in the *Snyder* case, by §5, Subdiv. (4), of the Interstate Commerce Act, as amended, (Act June 16, 1933, C. 91, §202), the Federal Government took possession of the field so far as relates to the consolidation of interstate carriers, superseding the State statutes, thenceforth, as to such consolidations. So, as to such consolidations as may have been effected since that amendment, the question here presented cannot arise.

If §20a were to be construed as requiring the authorization of the Interstate Commerce Commission in such a situation as here presented, where the consolidated corporation has acquired all of the property of its constituents, then, clearly, the creditors of the constituent corporations are deprived of their rights and property, without due process of law, and this, of course, may not be done even in the regulation of commerce.

United States v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, 327; 51 S. Ct. 159.

The contention of appellant is without merit; it is disposed of by *Missouri-Kansas-Texas R. Co.* v. *Mars*, 278 U. S. 258, 49 S. Ct. 103.

Therefore, on the ground that the question involved is of such an unsubstantial character as to be devoid of all merit and therefore frivolous, the appellee moves to dismiss the appeal.

Deming v. *Carlisle Packing Co.*, 226 U. S. 102, 33 S. Ct. 80;

Wick v. *Chelan Electric Co.*, 280 U. S. 108, 111; 50 S. Ct. 41;

Seaboard Air Line v. *Watson*, 287 U. S. 86, 92; 53 S. Ct. 32.

In the alternative, on the ground that the question on which the decision depends is so wanting in substance as not to need farther argument, the appellee moves to affirm the judgment below.

Hodges v. *Snyder*, 261 U. S. 600, 601; 43 S. Ct. 435.
Boston v. *Jackson*, 260 U. S. 309, 314; 43 S. Ct. 129.

Respectfully submitted,

(Sgd.) Louis J. Vorhaus,
Counsel for Appellee.

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Now comes the Appellee, Dorothea T. Frank, and moves to dismiss the appeal herein, on the ground that the case presents no substantial Federal question; and further moves, if the motion to dismiss is not granted, that this Court affirm the decision of the New York Court, on the ground that the question on which the decision of this cause depends is so unsubstantial as to need no further argument, all as appears in the statement of grounds making against the jurisdiction of this Court filed herewith.

(Sgd.) LOUIS J. VORHAUS,
Counsel for Appellee.